

7TH OPINION of Level 1 printed in FULL format.

In the Matter of the Request of US WEST Communications, Inc.  
to Grandparent CENTRON Services With Future Discontinuance  
of CENTRON, CENTREX, and Group Use Exchange Services

3-2500-10567-2; MPUC Docket No. P-421/EM-96-471

Minnesota Public Utilities Commission

1996 Minn. PUC LEXIS 189

December 23, 1996

OPINION:

[\*1]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER

The above-entitled matter came on for hearing before Administrative Law Judge Allen E. Giles on September 30, October 1 and 2, 1996 at 9:30 a.m. in the Large Hearing Room of the Minnesota Public Utilities Commission, 121 Seventh Place East, Suite 350, St. Paul, Minnesota.

In addition to U.S. West Communications, Inc. (hereinafter also referred to as "US WEST" or the "Company"), the following intervenors were granted full status as parties to the proceeding:

The Minnesota Department of Public Service; the Office of Attorney General, Residential and Small Business Utilities Division; Enhanced Telemanagement, Inc., d/b/a Frontier Telemanagement, Inc.; the State of Minnesota, Department of Administration; the Minnesota Business Utility Users Council; McLeod Telemanagement, Inc.; Firstcom, Inc.; AT&T Communications of the Midwest, Inc.; MCI Telecommunications, Inc. and MCI Metro; Info-Tel Communications, Inc.; MFS Intelenet of Minnesota Inc.; City of Minneapolis and Rochester Telecommunications Consortium.

The following persons made appearances on behalf of the parties at the hearing or filed Notices of Appearance:

James A. [\*2] Gallagher, Maun & Simon, 2000 Midwest Plaza Building West, 801 Nicollet Mall, Minneapolis, Minnesota 55402, and Victoria T. Aguilar, Attorney, US West Communications, Inc., 200 South Fifth Street, Room 395, Minneapolis, Minnesota 55402, on behalf of US West Communications, Inc.;

John B. Van de North and W. Patrick Judge, Briggs & Morgan, 2200 First National Bank Building, St. Paul, Minnesota 55101, and Rebecca DeCook, Suite 1575, 1875 Lawrence Street, Denver, Colorado 80202, on behalf of AT&T Communications of the Midwest, Inc.;

Eric F. Swanson and Anu Seam, Assistant Attorneys General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, on behalf of the Office of Attorney General, Residential and Small Business Utility Division;

Christopher K. Sandberg, Schatz, Paquin, Lockridge, Grindal & Holstein, PLLP, 100 Washington Avenue South, Suite 2200, Minneapolis, Minnesota 55401, on behalf of Firstcom, Inc.;

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Kristine L. Eiden and Michael Hatch, Hatch, Eiden & Pihlstrom, Suite 950 One Financial Plaza, 120 South Sixth Street, Minneapolis, Minnesota 55402, and Michael J. Shortley, III, Senior Attorney, Frontier Corporation, 180 South Clinton Avenue, Rochester, New York [\*3] 14646, on behalf of Enhanced Telemanagement, Inc., d/b/a Frontier Telemanagement, Inc.;

Ellen Gavin, Katherine L. McGill and Dennis Ahlers, Assistant Attorneys General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, on behalf of the Minnesota Department of Public Service;

Terry L. Adkins, Rochester City Attorney, 201 Fourth Street Southeast, Room 247, Rochester, Minnesota 55904-3780, and Susan Dixon, Telecommunications Coordinator, Olmsted County - ISC, 151 Fourth Street Southeast, Rochester, Minnesota 55904-3710, on behalf of the Telecommunications Consortium;

Ben I. Omorogbe and Amy J. Klobuchar, Gray, Plant, Mooty, Mooty & Bennett, P.A., 3400 City Center, 33 South Sixth Street, Minneapolis, Minnesota 55402, and Karen L. Clauson, Senior Attorney, MCI Telecommunications Corporation, 707-17th Street, # 3600, Denver, Colorado 80202, on behalf of MCI Telecommunications Corporation and MCI Metro;

Douglas G. Bonner and Anthony R. Petrilla, Swidler and Berlin Chartered, 3000 K Street N.W., Suite 300, Washington, DC 20007, on behalf of MFS Intelenet of Minnesota, Inc.;

David L. Sasseville, Lindquist and Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, [\*4] Minnesota 55402, and David R. Conn and William A. Haas, Associate General Counsel, McLeod, Inc., Suite 500, 221 Third Ave. SE, Cedar Rapids, IA 52401, on behalf of McLeod Telemanagement Inc.;

William E. Flynn, Lindquist and Vennum, 4200 IDS Center, 80 South Eighth Street, Minneapolis, Minnesota 55402, on behalf of Minnesota Business Utility Users Council;

Scott Wilensky, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, on behalf of the State of Minnesota Department of Administration;

Michael J. Bradley, Moss and Barnett, 4800 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota 55402, on behalf of Info-Tel Communications Inc.;

Carol Wold Sindt, City of Minneapolis Cable Officer, Room 123 City Hall, 350 South Fifth Street, Minneapolis, Minnesota 55415, on behalf of the City of Minneapolis; and

Cathy Hanson, Telecommunications Analyst, and Diane Wells, Telecommunications Analyst, 121 Seventh Place East, Suite 350, St. Paul, Minnesota 55101, on behalf of the Minnesota Public Utilities Commission, acting in a neutral capacity.

The Judge has taken notice of the decision of the Nebraska Public Utilities Commission submitted by US WEST Communications, [\*5] Inc. on December 9, 1996, however, the record for this decision in terms of argument from the parties closed upon receipt of reply briefs on November 23, 1996.

Notice is hereby given that, pursuant to Minn. Stat. @ 14.61, and the Rules of Practice of the Public Utilities Commission and the Office of Administrative Hearings, exceptions to this Report, if any, by any party adversely affected must be filed within 20 days of the mailing date hereof with the Executive Secretary, Minnesota Public Utilities Commission, 350 Metro Square, 121 Seventh Place East, St. Paul, Minnesota 55101. Exceptions must be specific and stated and numbered separately. Proposed Findings of Fact, Conclusions and Order should be included, and copies thereof shall be served upon all parties. If desired, a reply to exceptions may be filed and served within ten days after the service of the exceptions to which reply is made. Oral argument before a majority of the Commission will be permitted to all parties adversely affected by the Administrative Law Judge's recommendation who request such argument. Such request must accompany the filed exceptions or reply, and an original and 14 copies of each document should be [\*6] filed with the Commission.

The Minnesota Public Utilities Commission will make the final determination of the matter after the expiration of the period for filing exceptions as set forth above, or after oral argument, if such is requested and had in the matter.

Further notice is hereby given that the Commission may, at its own discretion, accept or reject the Administrative Law Judge's recommendation and that said recommendation has no legal effect unless expressly adopted by the Commission as its final order.

#### STATEMENT OF ISSUES

Whether US WEST Communications, Inc.'s proposal to grandparent CENTRON services with future discontinuance of CENTRON, CENTREX, and Group Use Exchange Services is in the public interest and consistent with applicable standards of law.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

#### FINDINGS OF FACT

##### Procedural Background

1. On April 30, 1996, US WEST filed a Petition with the Minnesota Public Utilities Commission to grandparent its CENTRON services and terminate CENTRON, CENTREX and Group Use Exchange Services by April 29, 2005. The company's filing follows an earlier filing of the same Petition on [\*7] February 5, 1996. That filing was rejected for failing to meet filing requirements. After US WEST and interested persons discussed issues arising out of the application, the Commission determined that there were contested issues requiring a contested case hearing under the Minnesota Administrative Procedure Act, Minn. Stat. chapter 14.

2. On May 31, 1996, the Commission issued a Notice and Order for Hearing and an Order Suspending Rates and Ordering Hearing. These Orders required that the issues presented by US WEST's application be set for a contested case hearing and suspended the effective date of the Company's proposal. The matter was referred to the Minnesota Office of Administrative Hearings.

3. A trial on the merits of US WEST's CENTRON proposal was held from September 30, 1996 through October 2, 1996 in the Large Hearing Room of the Public Utilities Commission in St. Paul, Minnesota.

4. Shortly before the trial, US WEST filed a motion requesting that the Judge strike portions of the testimony of several witnesses for the Intervenor. US WEST argued the motion at the beginning of the trial. All the Intervenor's opposed the motion. At the hearing, McLeod made a similar motion [\*8] requesting that portions of the testimony of US WEST witnesses be excluded for the same reasons as those asserted by US WEST for exclusion of McLeod's witnesses. The other participating Intervenor's joined McLeod's motion. The parties were given an opportunity to submit arguments on the motions in writing. Upon consideration of the motions, the Judge has decided to deny both motions for the following reasons. First, the Prehearing Order issued in this case established a deadline date of September 9, 1996 for raising objections to the admissibility of prefiled testimony. The Order further stated that unless objections are filed by the deadline date, they would be considered waived. Prehearing Order at 6. The motions are also denied because the Judge has determined that it is unnecessary to adhere to the strict rules of evidence to preserve the probative value and integrity of the prefiled testimony. Minn. Rules pt. 1400.7300, subp. 1 governs the admissibility of evidence in contested case proceedings. The rule provides, in part, as follows:

The Judge may admit all evidence which possesses probative value, including hearsay if it is the type of evidence which reasonable, prudent persons [\*9] are accustomed to rely in the conduct of their serious affairs . . . .

This general statement gives the Judge considerable flexibility regarding the admission of the evidence submitted in a contested case proceeding. At times this may require that the parties comply with formal evidentiary rules. However, the Judge has determined that compliance with formal evidentiary rules is not necessary to ensure the probative value of the prefiled testimony proposed as evidence in this proceeding.

#### Summary of US WEST Filing

5. US WEST proposes to grandparent and discontinue CENTRON, CENTREX and Group Use Exchange Services. The Company submitted its proposal to grandparent and discontinue CENTRON/CENTREX services in all states in the 14-state region in which it operates. Tr. p. 82.

6. CENTREX/CENTRON services refers to US WEST business telecommunications services that allow individuals within a community of users to communicate internally or with the public switch network using a switch located in US WEST's Central Office. CENTRON service is a feature-rich telecommunications service offering many of the service features that seem to have become necessary for the conduct of day-to-day [\*10] business, for example: direct inward dialing, call transfer, call forwarding, call hold, call pickup and call waiting.

7. The CENTRON/CENTREX services affected by the Company's filing include the following: CENTREX, CENTRON, CENTRON 50, CENTRON XL and Group Use. US WEST proposes to discontinue all CENTRON services to new customers effective July 9, 1996. Ex. 1, p. 1. Current customers could continue to utilize CENTRON services until April 29, 2005, however, the following growth restrictions will be applied:

Current customers may generally add no additional common blocks beyond those common blocks on record as of July 9, 1996;

Customers with 1-100 station lines will be limited to 100 percent growth in station lines every year;

Customers with 100 or more station lines will be limited to 100 percent growth in station lines every two years; and

Current customers will be limited to 20 additional locations each year for each of their common blocks.

Ex. 1, pp. 2-3.

8. According to US WEST, there are two reasons for its proposal to grandparent CENTRON services. Those reasons are:

a. To focus resources on developing a replacement central office-based product, and

b. To address [\*11] price arbitrage occurring with the current CENTRON offerings.

Ex. 4, p. 3.

#### Analysis of Impact of Proposal

9. US WEST proposes to withdraw CENTRON services before implementing a replacement Central Office-based product. US WEST is uncertain when a replacement product will become available; initially, the Company indicated that a product would be available in late Summer 1996. Ex. 4, p. 11. The Company also indicated that a replacement service would not be available until Fall of 1996. Ex. 5. After those time periods passed, the Company indicated that a replacement product would be available sometime between January and March of 1997. Ex. 20, Att. G. Most recently, the Company has indicated that a firm date cannot be set for introduction of the replacement product. Ex. 5, pp. 13-14.

10. There is increasing demand for CENTRON services in Minnesota. From 1993 to 1995, CENTRON/CENTREX user in the State of Minnesota grew by a substantial number. Proprietary Transcript Vol. 4, pp. 23, 25-26. This growth equals approximately 13 percent over the three-year period. Prop. Tr. Vol. 4, p. 27. From 1995 to 1996, demand for CENTRON service increased by over 10% in one year. US WEST Prop. [\*12] Ex. 8.

11. CENTRON service is not functionally obsolete, and there are no technical reasons requiring that the product be withdrawn. CENTRON service offers many functionalities that are well appreciated by customers.

12. Prior to this proceeding, US WEST has never withdrawn a CENTRON/CENTREX family service in Minnesota without a replacement product being made available. Tr. p. 93.

13. In the absence of US WEST's implementing a replacement for CENTRON, there will be no adequate substitute service for CENTRON. For example, direct end

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users would have to install their own premise switch such as a Key system or PBX involving substantial capital investment, or subscribe to the more expensive single-line business service offered by US WEST. In either case, the end user would find the cost of telephone service to be more expensive than at present. Ex. 38 at 6.

14. Local service resellers target end users that require a single system that serves multiple locations. Ex. 15. In the absence of having CENTRON for resale, resellers would have to install PBX equipment in each and every building complex or campus in order to provide service. It is not feasible for a reseller to install a PBX in [\*13] each separate location where customers might desire service. US WEST offers no functional equivalents or economical substitutes for CENTRON service that can be effectively used by resellers.

15. The Commission has recognized that the resale of CENTRON services is in the public interest. Order Authorizing the Resale of CENTRON Service, Docket No. P-999/CI-90-235 (January 19, 1993) (hereinafter "Resale Order"). The Commission found that resale of CENTRON expands availability of sophisticated business service options to small and medium-sized business. In so doing, the resale of CENTRON increases customer choices. Resale Order at 12. Consequently, the Commission declared, "CENTRON resale . . . is required by the public convenience and necessity in US WEST Communication's Inc. exchanges . . ." Resale Order at 18.

16. US WEST's proposal would prevent any new end user customer or Reseller from subscribing to CENTRON effective July 9, 1996. Because no new Reseller would be able to purchase CENTRON after July 9, 1996, US WEST would effectively limit the number of CENTRON Resellers in Minnesota to the number that existed as of July 9, 1996. The withdrawal of CENTRON will limit consumers' [\*14] choices and erect barriers to competitive entry by other service providers such as resellers. Ex. 38 at 11.

17. The resale of CENTRON service is an important market entry strategy for telecommunications carriers and telephone companies who desire to develop local exchange competition. In implementing the Telecommunications Act of 1996, the FCC recognized the importance of resale of local exchange service, stating that:

Resale will be an important entry strategy both in the short term for many new entrants as they build out their own facilities and for small businesses that cannot afford to compete in the local exchange market by purchasing unbundled elements or by building their own networks.

In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order. FCC 96-325, CC Docket No. 96-98, slip op. P 32 (FCC August 8, 1996).

18. The Telecommunications Act of 1996 requires that an incumbent local exchange carrier such as US WEST "offer for resale at wholesale rates any telecommunications service that the carrier provides as retail to subscribers who are not telecommunications carriers". 47 U.S.C. @ 251(c)(4)(A). [\*15] Therefore, US WEST is now required to provide CENTRON services at wholesale rates to resellers.

19. CENTRON is priced as a competitive service. US WEST's flat rate business line is priced according to the revenue requirements/rate design process of a

rate case proceeding. Resellers of CENTRON services purchase large blocks of lines and resells them to small or medium-sized businesses. The cost per line under US WEST flat rate business service substantially exceeds the cost per line for CENTRON.

20. A primary purpose of the US WEST decision to withdraw CENTRON from the Minnesota market is to prevent CENTRON Resellers from coming aggressively onto the market to take advantage of the price difference between US WEST's business flat rate service and CENTRON service.

21. The Commission has recognized in the Resale Order "that resale of CENTRON results in less net contribution than US WEST would experience in the absence of CENTRON resale." Tr. Vol. 1, pp. 67-68. The Commission also indicated in the same Resale Order that the procedural vehicle for addressing concerns relating to loss of contribution due to the resale of CENTRON was a general rate case proceeding.

22. US WEST's [\*16] application indicates that this proceeding is not intended to address the profitability of providing CENTRON services in Minnesota. Ex. 3. The Company has presented no cost studies that establish that US WEST is in fact experiencing a loss of contribution due to the resale of CENTRON services. This record does not establish that US WEST's revenue requirement is not being met or that CENTRON is priced below cost.

23. US WEST did not establish that any substantial adverse effect on its rates would result from the failure to approve its proposal. Tr. Vol. 1, p. 61, pp. 83-84; Tr. Vol. 4, pp. 7-10. CENTRON is currently priced in excess of its costs. Tr. Vol. 1, p. 61, pp. 83-84.

24. An important component of CENTRON service is its Central Office switching functions. At the present time only U.S. WEST can provide CENTRON service through its local exchange loop monopoly.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

#### CONCLUSIONS OF LAW

1. The Minnesota Public Utilities Commission and the Administrative Law Judge have jurisdiction over the subject matter of this hearing pursuant to Minn. Stat. §§ 237.60, subd. 2 (g) and 14.47 - 14.62 and Minn. [\*17] Rules Parts 1400.5100 - 1400.8300.

2. The Commission gave proper notice of the hearing in this matter, has fulfilled all relevant substantive and procedural requirements of law or rule and has the authority to take the action proposed.

3. As the Party proposing the action in this proceeding, US WEST has the burden of proof. The quantum of proof necessary to establish the facts supporting US WEST's proposal is proof by a preponderance of the evidence. Minn. Rules pt. 1400.7300, subp. 5.

4. US WEST has failed to establish a record supporting the reasons that it has offered for withdrawal of CENTRON service in Minnesota. The Company has failed to articulate any reason why CENTRON services must be withdrawn before

a suitable replacement telecommunications service is available. The Company has failed to establish a factual basis for its claim that "uneconomic arbitrage" has occurred or will occur and if it has occurred, why withdrawal of CENTRON service is the best method of addressing the problem.

5. US WEST has failed to prove that the withdrawal of CENTRON in Minnesota is reasonable.

6. Because the Commission has previously determined that CENTRON resale is in the public interest, [\*18] the legal standard that applies to US WEST's application is the public convenience and necessity standard. Because the resale of CENTRON is not competitive, the application should have been filed under Minn. Stat. § 237.74, subd. 9 (1994).

7. The public policy of the State of Minnesota as expressed in applicable statutes and that of the federal government is that the local exchange market should be open for more competition.

8. A primary reason for withdrawing CENTRON service is to deny the use of that service to new telecommunications carriers who might wish to resell the service. Therefore, the withdrawal of CENTRON services would present a barrier to entry into the local exchange market by Resellers.

9. Because CENTRON resale is a monopolistic service and can be provided only through US WEST's Central Office, withdrawal of CENTRON service requires a determination that public convenience and necessity requires the withdrawal.

10. Any of the above Findings of Fact more properly considered Conclusions of Law are hereby adopted as such.

11. The Administrative Law Judge makes these Conclusions for the reasons given in the attached Memorandum. Where necessary, reasons contained in the [\*19] Memorandum are adopted and incorporated herein as Conclusions.

#### RECOMMENDATION

The Administrative Law Judge respectfully recommends that the Commission DENY US WEST's proposal to grandfather CENTRON services.

Dated this 23rd day of December, 1996.

ALLEN E. GILES, Administrative Law Judge

#### MEMORANDUM

US WEST proposes to grandfather the CENTRON family of services and ultimately withdraw the services by the year 2005. Subscribers are limited to those who were taking the service on July 9, 1996, or had at that time filed an application for the service. Subscribers are also restricted as to the amount of services they may request during the grandfathering period. US WEST states that the reasons it has made this proposal are the following: (a) To bring its interest to bear on a replacement product and (b) to avoid the detrimental effects of resellers engaging in "uneconomic arbitrage".



US WEST's application generated substantial interest, numerous interested persons intervened in the proceeding. The Intervenor, aside from Government Public Interest intervenors, represented two types of CENTRON service users: End Users such as the Rochester Telecommunications Consortium, City of [\*20] Minneapolis and the State of Minnesota Department of Administration; and Resellers such as Frontier Telemanagement, Inc., McLeod Telemanagement, Inc., Firstcom, Inc., AT&T Communications, Inc., MCI Telecommunications, Inc. and MFS Intelenet of Minnesota, Inc. At the time of trial, only the Resellers and the Government Public Interest intervenors continued to participate contesting the application. Resellers purchase large blocks of CENTRON station lines and resell them to small and medium-sized businesses. Placing restrictions on the availability of CENTRON services and ultimately terminating the services altogether would adversely affect and ultimately terminate the resale of CENTRON in the State of Minnesota. Resellers argue that US WEST's grandfathering proposal is unreasonable and unsupported by the record, is not consistent with the public interest, anti-competitive and violates applicable federal and state statutes.

#### Applicable Legal Standards

US WEST filed its application to grandfather CENTRON services pursuant to Minn. Stat. § 237.60, which provides as follows:

(g) A telephone company may discontinue a telephone service that is subject to emerging competition, [\*21] as long as the discontinuance is effective for that service throughout the state, effective 60 days after notice to the commission, the department, and affected customers, unless the commission, within 45 days of the notice, orders a hearing on it. If the commission orders a hearing, the commission shall make a final determination on the discontinuance within 180 days of the date that notice of the discontinuance was filed with the commission, except that if a contested case hearing before an administrative law judge is required the commission shall make a final decision within ten months of the date the notice of discontinuance was filed.

US WEST asserts that because there are no legal standards contained in Minn. Stat. § 237.60(g) that apply to its application, it should be permitted to exercise its business judgment in connection with this "emerging competitive service". According to US WEST, the Company should be subject to a "reasonableness" standard in the exercise of its business judgment. In other words, the Company maintains that it should only be required to offer a reasonable basis for its proposal.

Upon review of the record, applying this legal standard, the Judge concludes [\*22] that US WEST has failed to prove that the basis for its proposal is reasonable. First, with respect to US WEST's claim regarding resellers engaging in uneconomic arbitrage, the Company has failed to establish that this is a reasonable basis for withdrawing CENTREX service. US WEST has failed to establish any facts justifying its claim that "uneconomic arbitrage" is occurring or has occurred. In addition, the Commission recognized that potential detriment could occur if US WEST's business flat rate customers migrated to CENTREX services resold by a telecommunications carrier. However, the Commission advised US WEST that this concern could be addressed through a rate case proceeding. Thus, the Judge concludes that this record does not establish that "uneconomic arbitrage" has occurred, and if it has occurred, there is a less drastic method for addressing the problem than withdrawing CENTRON service

altogether.

The other reason offered by US WEST for grandparenting CENTRON services is to focus on developing a replacement Central Office-based product. US WEST has offered no logical or reasonable basis why CENTRON service is being withdrawn before a replacement has become available. [\*23] In addition, because of the Company's representations regarding the date a replacement will become available, there is uncertainty about the date a replacement will be available. It does not appear reasonable to remove from the market a service for which there is continuing and increasing demand.

For these reasons, the Administrative Law Judge is not persuaded that US WEST has met the "reasonableness" legal standard that the Company itself advocated. Under the legal standard proposed by US WEST, the Company has failed to prove its case.

Firstcom, Inc. argues that US WEST's application to grandfather CENTRON must meet a more rigorous legal standard. Firstcom argues that US WEST must establish that public convenience and necessity requires the grandfathering of CENTRON service in the State of Minnesota. The Company argues that the application for discontinuance should have been filed under Minn. Stat. @ 237.74, subd. 9, which provides as follows:

Subd. 9. Discontinuance. If a physical connection exists between a telephone exchange system operated by a telephone company and the toll line or lines operated by a telecommunications carrier, neither of the companies shall have the connection [\*24] severed or the service between the companies discontinued without first obtaining an order from the commission upon an application for permission to discontinue the physical connection. Upon the filing of an application for discontinuance of the connection, the department shall investigate and ascertain whether public convenience requires the continuance of the physical connection, and if the department so finds, the commission shall fix the compensation, terms, and conditions of the continuance of the physical connection and service between the telephone company and the telecommunications carrier. Prior commission approval is not required for severing connections where multiple local exchange companies are authorized to provide service. However, the commission may require the connections if it finds that the connections are in the public interest.

According to this section, neither the telephone company nor a telecommunications carrier can discontinue service between the companies without first obtaining an Order from the Commission allowing the discontinuance. For the discontinuance to be approved, there must be a determination that the public convenience and necessity requires [\*25] the discontinuance. The Judge concurs with Firstcom's argument and concludes that US WEST's application for grandparenting CENTRON services should have been filed under this section. CENTRON is a monopoly Central Office-based switching service. At the present time, only US WEST can provide this Central Office switching service, there are no alternative providers. The Judge is aware that Minn. Stat. @ 237.59, subd. 1(a) (5) declares that "Central Office-based pricing packages providing switched business access lines" are "subject to emerging competition". Although the "pricing packages" are competitive, it does not follow that the resale of Central Office-based switched access is competitive. "Resale availability" of Centron is not competitive; at the present time there is no alternative provider of "resale availability." At the present time only U.S. WEST makes

"central-office based switched access" available for resale.

Another reason that a more rigorous standard of review applies to the US WEST application is that the Commission has already determined that resale of CENTRON services is in the public interest. It would be inappropriate to allow US WEST to nullify the determination [\*26] simply by the exercise of its "business judgment". It necessary follows that if the Commission has made a determination that resale is in the public interest that there must be a "public convenience and necessity" determination before CENTRON resale is discontinued.

Based on the foregoing, the Judge concludes that US WEST's grandfathering proposal requires a determination that public convenience and necessity requires that CENTRON services be discontinued. n1

- - - - -Footnotes- - - - -

n1 The Judge notes that Firstcom, Inc.'s argument regarding US WEST's CENTRON services be treated as a monopoly service was first raised in a Reply brief. US WEST has not had an opportunity to reply directly to the argument. However, US WEST does argue that CENTRON is a "competitive" service. The Administrative Law Judge acknowledges that Central Office-based switched access business lines compete with PBX systems. However, there is a compelling distinction to be drawn between the PBX-Central Office-based switching competition and the Reseller-US WEST competition: if Central Office-based switching is withdrawn, Resellers no longer have this service available and, therefore, cannot compete with US WEST.

- - - - -End Footnotes- - - - -

[\*27]

Whether US WEST's Application is Anti-Competitive

All the Reseller-intervenors claim that US WEST's application to grandfather CENTRON is anti-competitive. They assert that by grandfathering CENTRON, US WEST will eliminate this method of entry into the local exchange market in Minnesota. US WEST rejects this view, asserting that the resellers have no intention of using CENTRON as the "gateway" to the local exchange market in Minnesota and that there are other US WEST products such as business flat rate, CCMS and PBX that are viable resale alternatives to CENTRON that would allow competitive entry.

US WEST admitted in its application to grandfather CENTRON and through its witness Karen Baird that the Company is in part motivated by a desire to prevent Resellers from "aggressively" taking advantage of a "price anomaly". Karen Baird testified that there are currently seven Resellers authorized by the Commission to resell CENTRON and that "all the current indications are that unless the service is grandparented, additional resellers will aggressively enter the market." Ex. 4, p. 8. Thus, contrary to US WEST's argument, its own witness anticipates that Resellers will use CENTRON services [\*28] to "aggressively" enter the local exchange market.

The Judge has previously found that there are no US WEST products economically or functionally equivalent to CENTRON service that are useable by Resellers. Therefore, removal of CENTRON service will have the effect of eliminating this method of access to the local exchange market. US WEST's proposal to grandfather CENTRON services will erect a barrier to the entry into the local exchange market.

AEG

## **Impairment as Justification for SBC/Ameritech Merger**

*“Neither SBC nor Ameritech currently has the scale, scope, resources, management and technical ability to implement the proposed national and global strategy on its own.”<sup>1</sup>*

*“[W]hat I am telling you is we’re [SBC] not going to go into a de novo entry to evolve into a national local company. It would be death march in our opinion.”<sup>2</sup>*

- \* SBC/Ameritech view is that 50 MSA footprint is required to compete for “national local customers.”
- \* Merger necessary to enable entry to 30 cities over 3 years.
- \* Merged revenues of \$43 billion and net income of \$4 billion.
- \* Merged company begins with 36% of the nation’s business lines.

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<sup>1</sup> Description of Transaction, Public Interest Showing and Related Demonstrations.

<sup>2</sup> Testimony of James Kahan, SBC Senior Vice President, before the Ohio Public Utility Commission, Case No. 98-1082-TP-AMT, Tr. 176-177, January 7, 1999.

## Local Traffic Exchanged Between ILEC/CLEC Switches (Local Minutes 000's)

	Local Traffic Originating With:		Percent From ILEC	ILEC to CLEC Ratio
	CLEC Customers	ILEC Customers		
Ameritech	415,067	5,736,420	93.3%	13.8
Bell Atlantic	2,304,130	28,867,532	92.6%	12.5
BellSouth	574,962	7,332,570	92.7%	12.8
SBC	379,197	1,851,862	83.0%	4.9
US WEST	Does Not Respond to FCC Survey Question			
Total	3,673,355	43,788,384	92.3%	11.9

Source: ILEC Responses to FCC 4<sup>th</sup> Survey on Local Competition (4Q98)

Moreover, the ILECs grossly overstate the extent to which competitive transport has penetrated the market. According to the largest ILECs' 1998 Annual Access Filings, competitive transport providers in the switched access market had made only negligible inroads on the ILEC monopoly. The ILECs reported their own market shares as follows:<sup>48</sup>

	ILEC Market Share
Ameritech	98.1%
Bell Atlantic	90.0%
BellSouth	99.5%
Pacific	65.9%
Nevada	100.0%
SWBT	98.8%
U S West	94.8%
GTE	90.2%

Clearly, a wholesale market for competitively provided transport is still in its infancy.

Finally, CompTel notes that the ILECs who assert CLECs are not ordering transport UNEs fail to acknowledge the barriers they have erected to use of such UNEs. First, by excluding all carriers forced to order transport from the ILECs' tariff, rather than as a UNE, these ILECs hide the true demand for ILEC-provided transport.<sup>49</sup> Part of the reason CLECs must order from the tariff is that ILECs will not provision a transport UNE unless the CLEC is collocated at both the originating and the terminating end office. Where CLECs are collocated in only one location, such as in a situation where the CLEC wishes to obtain an extended link, the transport UNE is not available, and the only option is to order ILEC tariffed services. Moreover,

<sup>48</sup> Source: 1998 Annual Access Filing (Data for Calendar Year 1997) (Compares Interconnection Minutes that use ILEC Transport to Total Interconnection Minutes).

<sup>49</sup> See UNE Fact Report at II-21 (excluding "ILEC facilities obtained pursuant to tariff" from CLEC requests for ILEC transport).

CC-96-98  
CompTel Reply Comments  
6/10/99